88-1858

SUPREME COURT, U.S.
MAY 16 1989

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

DEXTER DRAKE COFFIN, III,
Petitioner,

-vs-

EDWARD W. MURAY, et. al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DEXTER DRAKE COFFIN, III
Staunton Correctional Center
301 Greenville Avenue
P. O. Box 3500
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Petitioner, pro se

May 16, 1989

QUESTIONS PRESENTED

1. Are the Due Process and equal protection rights of a criminal defendant violated where a prosecutor, without actually possessing supportive evidence, deliberately threatens use of his charging powers to induce a guilty plea?

2. Does a prosecutor's unfounded threat of bringing additional criminal prosecutions, which results in a guilty plea, constitute 'state interference' under United States v. Cronic, 466 U.S. 648 (1984), and Strickland v. Washington, 466 U.S. 668 (1984)?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, DEXTER DRAKE COFFIN, III, and the respondents, EDWARD W. MURRAY and the ATTORNEY GENERAL OF VIRGINIA.

The parties before this Court remain the same.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The petitioner, DEXTER DRAKE COFFIN, III, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled proceeding on January 25, 1989.

CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit was filed on January 25, 1989. The decision was not published. A petition for

rehearing and suggestion for rehearing en banc was denied on February 16, 1989. The unpublished decision of the United States District Court for the Eastern District of Virginia was filed on March 14, 1988. Copies of these opinions are included in the Appendix to this Petition.

JURISDICTION

The opinion of the United States Court of appeals for the Fourth Circuit was filed on January 25, 1989. An Order denying a petition for rehearing and suggestion for rehearing en banc was entered on February 16, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decisions of the courts below are based on Strickland v. Washington, 466 U.S. 668 (1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment VIII to the Constitution of the United States:

> In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the

> Assistance of Counsel for his defense.

made applicable to the states by Sections 1 and 5 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction of the equal protection of the laws.
>
> SECTION 2. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

and enforced by Title 28, United States Code, Section 2254:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United

States.

STATEMENT OF THE CASE

On March 10, 1986 petitioner was indicted by a Henrico County, Virginia grand jury on two counts of obtaining a controlled substance by means of fraud, deceit, misrepresentation, or subterfuge in violation of Virginia Code § 18.2-258.1. On March 19, 1986 petitioner appeared before the circuit court for disposition. During the course of his arraignment, petitioner expressed uncertainty of the charges brought by the Commonwealth and the trial court ordered a recess. Transcript of Plea Hearing as heard on March 19, 1986, p. 2 (Tr. 2). Thereafter, the following colloquy appears in the record:

> THE COURT: Let the record show that after recess the accused is present in person along with his defense counsel, Mr. Guy. Commonwealth Attorney's office represented by Mr. Parcell. Mr. Coffin, we were going through this series of questions and I asked did you fully understand the charge against you and you

asked for a recess. Now I just finished explaining to you and do you fully understand the charge against you, sir?

THE DEFENDANT: Yes sir, I do, Your Honor.

* * *

THE COURT: The Commonwealth's Attorney may have advised your attorney or you what punishment he will recommend if you plead guilty. Has anyone made you any other promise of leniency?

THE DEFENDANT: Not the leniency, Your Honor, but other representations.

* * *

MR. GUY: May it please the Court, I would like to state on Mr. Coffin's behalf what representations were made to the Court or to us rather, which based, uh, which Mr. Coffin based his decision to plead guilty on.

MR. GUY: Your Honor, Mr. Parcell of the Commonwealth Attorney's office stated to me that...he would not prosecute any other similar charges, which he is aware of at this time.

Tr. 3-7

Central to the grounds for relief advance by petitioner in the district court

is claim 12(2): that his guilty pleas were coerced and the product of threats of further criminal prosecution when, in fact, the prosecutor retained no such evidence he could use to pursue further prosecution and that petitioner was intimidated by the arresting officer when petitioner expressed his lack of understanding concerning the charges in open court.

In their Motion to Dismiss the respondents did not specifically deny these allegations and, thus, the record before the district court was limited to the allegation itself and evidence in the form of affidavits submitted by petitioner and his trial counsel.

In addressing this ground for relief the district court, in its Memorandum And Order, page 8, concluded that:

> Assuming arguendo that no other incidents had, in fact, occurred to provide grounds of prosecution, petitioner has not demonstrated that his decision to plead guilty would have changed.

> **Ballou v. Booker**, 777 F. 2d 910, 914 (4th Cir. 1985) (**quoting Strickland**, 466 U.S. at 689) (counsel's performance cannot be evaluated with the benefit of hindsight, hence technical decisions are not usually grounds for Sixth Amendment habeas corpus claimms).
>
> Appendix A1.

Upon review, the Fourth Circuit affirmed "on the reasoning of the Magistrate." Appendix A2.

Thereafter, petitioner timely filed his petition for rehearing and suggestion for rehearing en banc arguing that the claim should be reconsidered in light of this Court's opinions in Brady v. United States. 397 U.S. 742 (1970), and its progeny and, further, observing that the Fourth Circuit had previously held that absent a specific denial by the state of an allegation of constitutional deprivation, summary dismissal was improper. Jones v. Cunningham, 297 F.2d 851 (1962). In addition, although continuing to assert

that the prosecutor's actions constituted 'state interference' exempting petitioner from having to demonstrate the prejudice he endured, the petitioner detailed the facts comprising the Commonwealth's criminal allegations and demonstrated the prejudice suffered. Those undisputed facts disclosed that there had been no material misrepresentation made by petitioner; rather, the Commonwealth alleged that petitioner had misinformed the teating physician on matters relating to his occupation. Otherwise, petitioner had complied fully with the statute in that he had provided his residence address and phone number and accurate medical history. The treating physician, upon concluding a thorough medical examination and evaluation that included X-rays, determined petitioner's need of the medication prescribed and issued legitimate written orders. Notwithstanding the foregoing,

petitioner noted this Court's admonition in Strickland that "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." 466 U.S. 668, at 696, and argued that in light of the prosecutor's undisputed actions, the result of the proceeding was unfair. However, on February 16, 1989 the Fourth Circuit entered an Order denying reconsideration. Appendix A3.

REASONS FOR GRANTING THE WRIT

I.

WHEN A PROSECUTOR INDUCES A GUILTY PLEA BY MISREPRESENTING HIS ABILITY TO BRING ADDITIONAL CRIMINAL PROSECUTIONS, THE DEFENDANT HAS BEEN DEPRIVED OF HIS CONSTITUTIONAL RIGHTS AND HIS GUILTY PLEA IS INVALID AS INVOLUNTARY.

It is by now well settled that a guilty plea must be voluntary; that is, it must be "a voluntary and intelligent choice among the alternative courses open to the

defendant."North Carolina v. Alford, 400 U.S. 25, 31 (1970). Equally unquestionable, a guilty plea is invalid if induced by threats, misrepresentation, or perhaps by promises having no proper relationship to the prosecutor's business. Brady v. United States, 397 U.S. 742 (1970).

In Bordenkircher v. Hayes, 434 U.S. 357 (1978), this Court held that the Constitutional rights of a criminal defendant are not violated when a prosecutor induces a guilty plea by threatening additional criminal prosecutions provided that the prosecutor is in possession of evidence justifying those prospective charges at the time of the defendant's indictment on the original counts. The facts before the Court in Bordenkicher v. Hayes revealed no dispute existing between the parties that the prosecutor's threat was fully justified by

evidence he possessed at the time of the original indictment and that Hayes' refusal to plead guilty precipitated the filing of the additional criminal charge. Such, however, are not the circumstances now before the Court.

The record in petitioner's case clearly reveals he expressed uncertainty to the trial court regarding the charges to which he was being asked to enter a plea. Thereupon, the trial court ordered a recess and further conferences between opposing counsel and petitioner and defense counsel ensued with petitioner having been informed that unless he entered guilty pleas to both counts before the trial court, additional criminal prosecutions would be instituted. There can be no question but that petitioner retained the legal right to plead not guilty and proceed to trial prior to the plea colloquy. While from the record it may be inferred that opposing

counsel discussed a resolution of the charges prior to the hearing, there is no dispute that the prosecutor's threat of bringing additional criminal charges unless petitioner entered guilty pleas to those counts then before the trial court occurred during the court-ordered recess - scant moments during which the petitioner had to weigh his options. Although no record exists, there is "a strong inference" of prosecutorial vindictiveness in this case. It is by now axiomatic that "for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" Bordenkircher v. Hayes, supra, at 363, citing Chaffin v. Stynchcombe, 412 U.S. 17, 32-33, n. 20 (1973). Thus, this case places squarely before the Court the circumstances referred to in Brady v. United States, supra, at 751, n. 8, of "the situation where the

prosecutor...deliberately employ(s) (his) charging powers to induce a particular defendant to tender a plea of guilty." Because of the importance of the issues involved in this case, it is respectfully submitted that review by this Court would be appropriate.

II.

WHEN A PROSECUTOR WITHOUT SUPPORTIVE EVIDENCE THREATENS ADDITIONAL CRIMINAL PROSECUTIONS UNLESS THE DEFENDANT PLEADS GUILTY, SUCH ACTION MAY BE CONSIDERED "STATE INTERFERENCE."

In articulating the standards attendant in reviewing Sixth Amendment claims of ineffective assistance of counsel, this Court adopted general principles in the application of a two-prong test involving both counsel's conduct and evidence of prejudice a criminal defendant must show he suffered by way of a deficiency in counsel's performance. However, the Court also noted certain circumstances in which prejudice is presumed. The "actual or constructive denial of the assistance of counsel (or) various kinds of state interference with counsel's assistance" carry the presumption that prejudice is likely to have resulted. Strickland v. Washington, 466 U.S. 668,

692 (1984); United States v. Cronic, 466 U.S. 648, 658-61 (1984). The rationale supporting this premise is embodied in the realization that "such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." Strickland, supra, at 692 (emphasis added).

The facts evident in the present case support petitioner's assertion that the prosecutor's actions, for which only he may be held directly responsible, constituted "state interference" and, thus, petitioner's exemption from the requirement of demonstrating prejudice. This assertion has two separate components. First, it is significant to consider the stage of the proceedings during which the pprosecutor elected to advance his threat of bringing additional charges unless petititoner

entered guilty pleas to those then being heard: a court-ordered recess in the hearing during which petitioner had expressed confusion and when petitioner had minimal time to entertain his options and whereby trial counsel and petitioner had no opportunity to investigate the viability of the prosecutor's threat. In this regard, petitioner does not suggest that the Court should consider the adoption of a static rule relating to the amount of advance notice a prosecutor must provide a defendant to evaluate such a plea offer. In "the 'give-and-take' of plea bargaining," Bordenkircher v. Hayes, supra, at 363, petitioner concedes such a rule would be impractical. However, if a court finds credible a claim that the prosecutor possessed evidence of other charges he could bring at the time of the original indictment and there have been plea discussions prior to the hearing which, as

discussed supra, at 8, may be inferred in the present case, the state should be required to articulate its reasons for such an eleventh-hour proposition lest the prosecutor's motives arouse suspicion.

Second and far more importantly, both ethical and moral considerations aside, in this case the prosecutor impeded upon counsel's province when he interposed an ultimatum which, although subsequently determined a ruse, severely limited trial counsel's ability to function as a competent and informed advisor. Such competency, knowledge, and effectiveness are central to the necessity for counsel during a serious criminal proceeding. Gideon v. Wainwright, 372 U.S. 335 (1963). Thus, when a state's agent, the prosecutor, manipulates prevailing circumstances deceptively he undermines trial counsel's function resulting in a deprivation of the defendant's right to fundamental fairness.

There should be no place for such conduct in American jurisprudence. Because of the importance of this issue, petitioner respectfully suggests that review by this Court is appropriate.

CONCLUSION

Because of the importance to the public of the issues presented herein, this petition for certiorari should be granted.

Respectfully Submitted,

DEXTER DRAKE COFFIN, III

/s/ Dexter D. Coffin, III
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Petitioner, pro se

May 16, 1989

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

DEXTER DRAKE COFFIN, III,

Petitioner,

v.

EDWARD W. MURRAY, et al.,

Respondents

CIVIL ACTION NO. 87-0685-R
Magistrate's No. 88-0005-L

MEMORANDUM AND ORDER

Dexter Drake Coffin, III, a Virginia state prisoner, proceding pro se, brings this petition for a writ of habeas corpus challenging his 1986 convictions of obtaining a controlled substance by faud or deceit. Jurisdiction is appropriate pursuant to 28 U.S.C. § 636(c) and 2254. Respondents have filed a motion to dismiss and petitioner has responded.

Additionallly petitioner has filed a motion for an emergency expedited evidentiary hearing.

Petitioner makes the following allegations:

Ground 1: Va. Code Ann. § 18.2-258.1 under which petitioner was convicted is unconstitutionally vague and ambiguous.

Ground 2: Petitioner's guilty plea was involuntary and the product of coercion.

Ground 3: Ineffective Assistance of Counsel.
(a) Guilty pleas were the result of ineffective assistance of counsel and under duress;
(b) Failure of counsel to research defense of amnesia;
(c) Failure of counsel to research and raise the defense of irresistible impulse -- failure to obtain psychiatric evaluation pursuant to Va. Code Ann. § 19.2-169.5;
(d) Failure of counsel to raise the defense of petitioner's addiction to analgesic medication;
(e) Failure of counsel to move for change of venue;
(f) Failure of counsel to interview witnesses for the Commonwealth;
(g) Counsel gave petitioner misleading advice to plead guilty despite notice of petitioner's medical information of an exculpatory nature;
(h) Failure of counsel to adequately consult with petitioner with respect

to his plea of guilty;
(i) Failure of counsel to submit evidence of petitioner's physical and mental condition at the time of the offense;
(j) Failure of counsel to inform petitioner of the size of the jury, that a unanimous verdict was required, and that jury would determine sentence upon a finding of guilt. Additionally, counsel did not inform petitioner, that the burden of proof was on the Commonwealth and that such burden required proof of guilt beyond a reasonable doubt;
(k) Failure of counsel to inform petitioner of the elements of the crime, that such elements require proof of guilt beyond a reasonable doubt, and failure of counsel to explain the elements to petitioner;
(l) Failure of counsel to correct errors contained in the presentence investigation.

Ground 4: Court relief on misleading information contained in presentence investigation.

Ground 5: Conviction unconstitutional due to petitioner's unique propensity for drug addiction.

Ground 6: Conviction unconstitutional because petitioner's addiction was caused by error and unskillfulness of his physicians.

Ground 7: Petitioner's sentence is unconstitutionally excessive--20 year suspended sentence.

The record shows that petitioner previously filed a petition for writ of habeas corpus in the Supreme Court of Virginia raising the same claims alleged in the instant petition. The Supreme Court of Virginia dismissed the petition. **Dexter Drake Coffin, III, No. 147923 v. Warden of Augusta Correctional Center**, Record No. 870311 (Oct. 28, 1987). Petitioner has, therefore, exhausted his state court remedies.

On October 19, 1986, petitioner pled guilty to two indictments against him saying that he unlawfully obtained Theodur and Tussionex by means of fraud, deceit, misrepresentation or subterfuge. Before accepting petitioner's plea of guilty, the Court questioned petitioner at length as to the circumstances of his plea. At one point petitioner indicated that he did not fully understand the charges against him and the court recessed to let him confer

with his counsel.

Following the recess, the court resumed its inquiry to determine the voluntariness of the plea. Petitioner indicates that he fully understood the charges against him and that he was making the plea freely and voluntarily. Petitioner indicated that he was pleading guilty because he was, in fact, guilty of the crime charged and he was aware that he was waiving a trial by jury. Petitioner indicated that his decision to plead guilty was not the result of threats by the police, Commonwealth's Attorney, or any other officials and that he understood that the Cout was not bound by plea agreements. The inquiry revealed that petitioner had ample time to discuss possible defenses with counsel and that after such discussions petitioner had decided for himself to plead guilty. Petitioner indicated that he was satisfied with the

services of counsel and that he understood that his guilty plea waived his right to appeal. Lastly, petitioner indicated that he understood the questions asked by the Court. (Tr. 3-5)[1]

Petitioner's initial claim is that the statute under which he was convicted, Va. Code Ann. § 18.2-258.1, is unconstitutionally vague and ambiguous. Section 18.2-258.1 provides in pertinent part:

> Obtaining drugs, procuring administration of controlled substances, etc., by fraud, deceit, or forgery--A. It shall be unlawful for any person to obtain or attempt to obtain any drug...by fraud, deceit, misrepresentation, or

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[1] The inquiry by the Court concerning the voluntariness of petitioner's guilty plea followed the court's arraignment of petitioner on the first charge concerning the controlled substance Theodur. Petitioner was then arraigned on the second charge concerning the controlled substance Tussionex. Rather than repeating all of the questions previously asked, the Court simply asked if his responses would be the same. Petitioner indicated his responses would be identical.

subterfuge;...

The "void-for-vagueness" doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. **Kolender v. Lawson**, 461 U.S. 352, 357 (1983); see also **Suddarth v. Slane**, 539 F. Supp. 619 (W.D. Va. 1982). The underlying principle of the due process requirement is that an individual shall not be held criminally responsible for behavior that he could not reasonably understand to be proscribed. **Suddarth**, 539 F. Supp. at 619. Consequently, if petitioner could reasonably have been aware that his conduct was proscribed then the statute is not unconstitutionally vague. Section 18.2-258.1 tells any person of ordinary intelligence not to use a false name to obtain or attempt to obtain drugs.

McCutcheon v. Commonwealth, 224 Va. 30, 35, 294 S.E.2d 808, 811 (1982).

The transcript of the plea hearing reveals that petitioner misrepresnted himself as an attorney to Dr. David L. Hudson in order to obtain the prescriptions and to Amy Andrews, a pharmacist, to have the prescriptions filled. (Tr. 9, 15). Petitioner also misrepresented the fact that he was associated with a firm named Thibadeau & Coffin in Palm Beach, Florida. Further investigation revealed that the phone number provided by petitioner belonged to a firm named Washburn & Associates with which petitioner was not associated. (Tr. 18). It is not unreasonable to believe that petitioner knew that making such misrepresentations to obtain prescription drugs was unlawful. Accordingly, Claim 1 is DISMISSED.

In Ground 2, petitioner asserts that his guilty plea was involuntary and the

product of coercion. His claims set forth three bases of coercion--that he did not understand the charges against him, that Detective F.E. Bolling gave petitioner a disgusting look and threw his arms in the air during the plea hearing, and that due to ineffective assistance of counsel his decision was coerced by threats of the Commonwealth's Attorney to file additional charges. The ineffective assistance ground is dealt with in Claim 3.

A "plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." **Boykin v. Alabama**, 395 U.S. 238, 242 (1969). Accordingly, the record must reveal that the plea was not the product of ignorance, incomprehension, coercion, terror, inducements, or subtle or blatant threats. **Id.** at 242-43.

With respect to petitioner's claim that he did not understand the elements of the crimes charges, it is unsupported by the record. Although petitioner initially expressed uncertainty about the charges, the trial judge recessed the proceeding to allow him to confer with counsel. Following the recess, the judge again inquired as to the petitioner's understanding of the charges. Petitioner indicated that he fully understood the charges against him. Petitioner's guilty plea was not the product of ignorance or incomprehension of the charges. **Boykin**, 395 U.S. at 242-43. Additionally, assuming arguendo that Detective Bolling did act as petitioner suggests, such behavior simply does not rise to the level of intimidation contemplated in **Boykin**. Hence, petitioner's plea was not coerced in that regard. **Id.** Accordingly, Claim 2 is DISMISSED.

Petitioner next argues that his conviction was the result of ineffective assistance of counsel. In Ground 3(a), he claims that due to the ineffectiveness of his counsel, his plea was coerced by threats of the Commonwealth's Attorney to file additional charges. In **Hill v. Lockhart**, the Supreme Court directly addressed this issue. 474 U.S. 52 (1985). The Court held that the "error and prejudice" test announced in **Strickland v. Washington**, 466 U.S. 668 (1984), applies to errors in counseling guilty pleas. Specifically, in order to secure relief on his allegation that his guilty plea was the product of ineffective assistance of counsel, petitioner must show: (1) that counsel made errors so serious that counsel was not functioning as guaranteed to the defendant by the Sixth Amendment; and (2) that counsel's deficient performance prejudiced the defense to the extent that,

but for the professional errors, the result of the proceeding would have been different. **Hill**, 474 U.S. at 58-59.

The record indicates that the Commonwealth's Attorney agreed in an exchange for petitioner's guilty plea on the two charges at issue he would recommend five years consecutive on one count and not recommend consecutive time on the other count. Additionally, the Commonwealth promised not to prosecute any other similar charges of which it was aware at the time.[2]

"The long-standing test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the

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[2] The affidavit of petitioner's counsel, Colin Guy, indicates that he spoke with Commonwealth's Attorney Parcell and was advised that there were ongoing investigations of defendant (petitioner) regarding other counts of prescription fraud. Parcell agreed not to file other drug-related cases originating in Henrico County in exchange for petitioner's guilty plea to the two indictments.

alternative courses of action open to the defendant.'" **Hill**, 474 U.S. at 56 (citing **North Carolina v. Alford**, 400 U.S. 25, 31 (1970). Moreover, a prosecutor's statement of intent during plea bargaining to add a charge justified by evidence possessed before original indictment is not a due process violation solely because it pressures the accused to plead guilty and waive jury trial. **Bordenkircher v. Hayes**, 434 U.S. 357, 364-65 (1978).

The trial transcript reveals that the trial judge engaged in a thorough inquiry as to the circumstances of petitioner's guilty pleas. He asked petitioner if his pleas were the product of duress and whether he was satisfied with the services of his attorney. All of petitioner's responses indicate that the guilty pleas were knowing and voluntary. **Hill**, 474 U.S. at 56, and that there were no errors on the part of counsel that deprived petitioner of

his Sixth Amendment rights. **Strickland**, 466 U.S. at 687. The fact that petitioner's agreement to plead guilty may have been influenced by the probability of facing additional charges in Henrico County does not render the pleas unconstitutionally involuntary. **Bordenkircher**, 434 U.S. at 364-65.

Petitioner claims that to the best of his recollection and knowledge, no other prescription fraud incidents occurred which the Commonwealth's Attorney could have prosecuted. Assuming arguendo that no other incidents had, in fact, occurred to provide grounds of prosecution, petitioner has not demonstrated that his decision to plead guilty would have changed. **Ballou v. Booker**, 777 F.2d 910, 914 (4th Cir. 1985) (**quoting Strickland**, 466 U.S. at 689) (counsel's performance cannot be evaluated with the benefit of hindsight, hence, technical decisions are not usually grounds

for Sixth Amendment habeas corpus claims).

Petitioner alleges in Grounds 3(b), (c), (d), and (i) that his attorney failed to research the defense of amnesia, failed to obtain a psychiatric evaluation for petitioner, and failed to raise petitioner's addiction to analgesic drugs and his related psychological problems as a defense. There is evidence in the record that petitioner suffers from drug addiction and related psychological problems.[3]

Assuming that counsel was aware of these possible defenses, which is supportred by the record, petitioner has not demonstrated that it would have altered his decision to plead guilty. **Ballou**, 777 F.2d at 914 (**quoting Strickland**, 466 U.S.

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[3] The Court refers to the testimony of Dr. Robert Showalter, a psychiatrist, in the Circuit Court of Charlottesville, Virginia, on February 26, 1986. Additionally, the record contains a letter from Dr. Showalter and a letter from Dr. Arthur D. Ericsson.

at 689). In short, petitioner has demonstrated no prejudice to his defense as a result of counsel's failure to research and raise these defenses as opposed to advising petitioner to plead guilty. **Hill**, 474 U.S. at 58-59.

In Grounds 3(e) and (f), petitioner alleges ineffective assistance of counsel due to his attorney's failure to move for change of venue and to interview the witnesses for the Commonwealth. Petitioner offers no factual basis to support his allegations. **Oliver v. Wainwright**, 795 F.2d 1524, 1531 (11th Cir. 1986). Moreover, petitioner has failed to establish prejudice to his defense as a result of these alleged errors. **Strickland**, 466 U.S. at 687.

In Grounds 3(g) and (h), petitioner asserts that his counsel was ineffective in failing to properly advise him with respect to pleading guilty, despite knowledge of

petitioner's drug addiction and related psychological problems. Additionally, petitioner asserts that counsel failed to discuss the elements of the offense with him. It is undisputed that counsel was aware of petitioner's addiction. The record also indicates that petitioner was satisfied with the services of his attorney at the time he entered his guilty pleas. As discussed in Claim 1, the evidence is overwhelming that petitioner's conduct in obtaining the prescription drugs was deceitful and that it was not unreasonable to conclude that petitioner knew his actions were unlawful. Counsel's decision to advise petitioner to plead guilty was a tactical one, which this Court will not second-guess. **Ballou**, 777 F.2d at 914: **see also Goodson v. United States**, 564 F.2d 1071, 1072 (4th Cir. 1977).

In Grounds 3(j), (k), and (l), petitioner alleges ineffective assistance

of counsel due to failure of his attorney to inform him regarding the size of a jury, that a unanimous verdict would be required for conviction, that the jury would determine the sentence, and that the burden of proof would be on the Commonwealth. Additionally, petitioner alleges that counsel failed to inform him of the elements of the offenses charged, that he did not understand the elements, and that counsel failed to correct errors contained in the presentence investigation. Plaintiff has failed to establish prejudice to his defense as a result of any of these alleged errors. **Strickland**, 466 U.S. at 687.

Petitioner has failed to show error on the part of counsel or prejudice to his defense with respect to any of his allegations of ineffective assistance of counsel. Accordingly, petitioner's Claim 3 is DISMISSED.

In Grounds 5 and 6, petitioner claims that his conviction was unconstitutional due to his unique propensity for drug addiction and the fact that his addiction was caused by the errors and unskillfulness of his physicians. Petitioner's allegations amount to nothing more than his own conclusions. He cites no legal authority and the Court has found none in Virginia to support his argument. **Oliver v. Wainwright**, 795 F.2d 1524, 1531 (11th Cir. 1986) (vague assertions which do not state a constitutional violation do not merit further consideration). Accordingly, Claims 5 and 6 are DISMISSED.

In Ground 4, petitioner alleges that the Court relied on misleading information contained in the presentence investigation. The record reflects that petitioner was afforded an opportunity to review the presentence report. He reviewed the report and the only errors he noted were corrected

at sentencing. (Tr. 26). Petitioner made a lengthy personal sentencing statement. At no point did he complain of any additional errors in the presentence report. The Supreme Court of Virginia dismissed petitioner's claim on the basis of procedural default--his failure to raise the objection in the trial court. **Slayton v. Parrigan**, 215 Va. 27, 205 S.E.2d 680 (1974) (objection not raised in trial court or on direct appeal is not subject to habeas review). Where a petitioner forfeits state review of a claim by failing to comply with state procedural requirements, federal habeas corpus review is barred by the procedural default absent a showing of cause and prejudice. **Wainwright v. Sykes**, 433 U.S. 72, 87 (1977). Existence of cause for procedural default must ordinarily turn on whether the prisoner can establish that some objective factor external to the defense impeded

counsel's efforts to comply with the state's procedural rule. **Murray v. Carrier**, 106 S.Ct. 2639, 2646 (1986). Petitioner has failed to establish such an external factor, hence he fails to satisfy the "cause" prong of the **Wainwright** exception preclusive procedural default. **Wainwright**, 433 U.S. at 87. Federal habeas corpus review of Claim 4, therefore, is procedurally barred, and the claim is DISMISSED.

Finally, in Ground 7 petitioner asserts that the sentence imposed was unconstitutionally excessive. On his first conviction, imposition of sentence was suspended for a period of twenty (20) years. Virginia statutes do not limit the power of the Court to suspend a sentence except that the period of the suspension must not be unreasonable. Va. Code Ann. § 19.2-303.1. On his second conviction, petitioner received a sentence of five (5)

years. The maximum possible sentence for a conviction of fraudulently obtaining drugs is 1 to 5 years confinement. Va. Code Ann. §§ 18.2-10; and -258.1. The Supreme Court of Virginia dismissed this claim on the rule in **Slayton v. Parrigan**, 215 Va. 27, 205 S.E.2d 680 (1974). Again, the record reflects that no objection was made to the trial court concerning the sentence imposed. Petitioner has shown neither cause for nor prejudice from his failure to object. **Murray**, 106 S.Ct. at 2646; **Wainwright**, 433 U.S. at 87. Accordingly, federal habeas corpus review of claim 7 is procedurally barred, and the claim is DISMISSED.

For the reasons stated herein, petitioner's entire petition will be DISMISSED.

Petitioner is advised that he may appeal the decision of this Court. Should he wish to do so, written notice of appeal

mmust be filed with the Clerk of this Court within thirty (30) days of the date hereof.

And it is so ORDERED.

/s/ David G. Lowe

U.S. Magistrate

Date: March 14, 1988

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-6585

DEXTER DRAKE COFFIN, III
Petitioner - Appellant

v.

EDWARD W. MURRAY, Director,
Virginia Department of
Correction; ATTORNEY GENERAL
OF VIRGINIA
Respondents - Appellees

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. David G. Lowe, United States Magistrate. (C/A No. 87-685-R)

Submitted: December 7, 1988
Decided: January 25, 1989

Before MURNAGHAN and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge

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Dexter Drake Coffin, III, appellant Pro Se.
Linwood T. Wells, Jr. (OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA) for Appellees.

PER CURIAM:

Dexter Drake Coffin, III, appeals from the United States Magistrate's* order refusing habeas corpus relief pursuant to 28 U.S.C. § 2254. Our review of the record and the Magistrate's opinion discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the Magistrate. Coffin v. Murray, C/A No. 87-685-R (E.D. Va. Mar. 14, 1988). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and would not aid the decisional process.

AFFIRMED

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* Jurisdiction is appropriate under 28 U.S.C. § 636(c) (2).

FOR THE FOURTH CIRCUIT

No. 88-6585

Dexter Drake Coffin, III
Petitioner - Appellant

versus

Edward W. Murray, etc., et al
Respondents - Appellees

O R D E R

Upon consideration of appellant's petition for rehearing and suggestion for rehearing in banc, and the appellant's motion to stay the mandate pending applicant to the Supreme Court of the United States for a writ of certiorari,

As no active member of the Court requested a poll on the suggestion for rehearing in banc,

IT IS ORDERED that the petition for rehearing and motion to stay the mandate are denied.

Entered at the direction of Judge Murnaghan with the concurrence of Judge Chapman and Judge Butzner.

For the Court,

JOHN M. GREACEN

CLERK